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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAMES WALTER LOUDER, Appellant.	2 CA-CR 2010-0344 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083998

Honorable Michael O. Miller, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 James Louder appeals from his conviction and sentence for criminal damage.[1] He asserts the trial court erred in denying his motion for judgment of acquittal on the criminal damage charge, that insufficient evidence supported the criminal damage verdict, and that a superseding cause precluded his criminal liability on that charge. He also argues A.R.S. § 13-1602(B)(3)[2] is unconstitutionally vague. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Louder's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Louder, while driving on Benson Highway, approached a curve in the road, drove into a raised median and over a raised curb, ran into a road sign and crashed into several parked cars in a nearby hotel parking lot. He was charged with, and convicted of, criminal damage "causing damage in an amount of more than $2,000 but less than $10,000." The trial court suspended imposition of sentence and placed him on three years' probation. This appeal followed.

[1]Louder also was convicted of driving while under the influence of liquor and driving with an alcohol concentration of .08 or more, but does not challenge those convictions on appeal.

[2]The statute has been renumbered since the time of Louder's offense. Because no substantive changes have been made, we refer to the current statute number for ease of reference. *See* 2009 Ariz. Sess. Laws, ch. 144, § 2 (renumbering former § 13-1602(B)(2) as § 13-1602(B)(3)).

Discussion

Sufficiency of Damages Evidence

¶3 Louder argues the trial court erred when it denied his motion for judgment of acquittal on the charge of criminal damage made pursuant to Rule 20, Ariz. R. Crim. P., arguing there was no substantial evidence to prove the amount of damage Louder had caused exceeded the $2,000 statutory minimum for a class five felony. *See* § 13-1602(B)(3) (criminal damage class five felony if defendant recklessly damages property of another in amount of at least $2,000 but less than $10,000). He also challenges the sufficiency of the evidence to support the conviction.

¶4 A judgment of acquittal should be granted only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We review a trial court's denial of a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). On appeal, we will not set aside the verdict for insufficient evidence unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury," viewing that evidence in the light most favorable to sustaining the verdict. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶5 Criminal damage constitutes a class five felony "if the person recklessly damages property of another in an amount of two thousand dollars or more but less than

ten thousand dollars." § 13-1602(B)(3). The state has the burden of proving the amount of damage caused and showing what method it used to calculate that amount. *State v. Brockell*, 187 Ariz. 226, 229, 928 P.2d 650, 653 (App. 1996). No particular method of calculation is required; instead the amount of damage "is determined by applying a rule of reasonableness to the particular fact situation presented." *Id.* at 228, 928 P.2d at 652. And the general rules for determining damage to property "'should be flexible guides in determining the true amount of loss.'" *Id.*, *quoting Dixon v. City of Phx.*, 173 Ariz. 612, 620, 845 P.2d 1107, 1115 (App. 1992). When personal property "is susceptible of repair . . . the proper measure is the reasonable cost of repair." *Id.*

¶6 The jury determined Louder had damaged property in the amount of "$2,001 to $10,000." Viewed in the appropriate light, the evidence established Louder had damaged a street sign and three parked cars, including a green pickup truck, a beige sedan, and a white passenger van. A city employee testified it cost $239.83 to repair the sign. The owner of the white van testified she paid at least $1,680 to repair the front bumper, grill, door, and front headlights. She further testified there was damage to the paint but did not get an estimate for the cost to repaint the van. The testimony of the city employee and the van's owner established a total of at least $1,919.83 in damage. Photographs admitted into evidence of the sedan showed considerable damage to the front end, including a crumpled hood, dented side panel, dented front bumper, and broken headlights. The photographs of the truck showed damage to the bumper. Applying a rule of reasonableness, *see Brockell*, 187 Ariz. at 228, 928 P.2d at 652, the jury could have found the cost to paint the van and to repair the significantly damaged sedan and the

truck's bumper would have been at least $80.17, enough to meet the statutory limit for a class five felony under § 13-1602(B)(3). *See also State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980) (when determining value, jury may use common sense).

¶7 Louder argues the testimony of the van owner was insufficient because "the State gave [her] a variety of 'ballpark' amounts until she agreed on certain amounts" but she had "no actual recollection of her expenses." However, it was for the jury to assess the credibility of the witnesses, weigh the evidence, and resolve any conflicts in the evidence. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). Louder also challenges the testimony of a hotel patron as "insufficient and far too tenuous to support a conviction," because, although she testified that before the accident the cars in the parking lot were in good condition, she did not identify the vehicles she had observed as being the same vehicles damaged by the accident, and the state failed to show who owned those vehicles. This argument also goes to the weight of the evidence. *See id.* Moreover, other evidence supported the state's position that Louder caused damage to the sedan, van, and truck. The officer who had arrived at the scene of the accident testified Louder's vehicle had struck the sedan and van, both of which had been pushed out of their parking spots, testified the truck had been damaged by the sign, and testified as to the individuals who owned the vehicles.

¶8 Louder also argues the cost to repair the sign cannot be included in the damages because the city is not "another person" under § 13-1602(A)(1). However, the criminal code defines "person" as "a human being and, as the context requires, . . . a government, a governmental authority or an individual or entity capable of holding a

legal or beneficial interest in property." A.R.S. § 13-105(30); *see also State v. Superior Court*, 188 Ariz. 372, 373, 936 P.2d 558, 559 (App. 1997) (under criminal damage statute "property of another" includes "any property in which the defendant had anything less than exclusive ownership"). A city employee testified the damaged sign was property of the city and was replaced by the city. That testimony was sufficient to establish the city's property interest in the sign and meet the requirements of § 13-105(30).

¶9 From the evidence presented at trial, which included testimony regarding the damage and cost to repair the street sign and van, and photographs of the damage caused to the sign and the three vehicles, reasonable jurors could find beyond a reasonable doubt that Louder damaged property in an amount equal to or greater than $2,000. Thus, the trial court did not err in denying the Rule 20 motion Louder had made on the basis of insufficient proof of damages, and the guilty verdict on the criminal damage charge is supported by sufficient evidence.

Superseding Cause

¶10 Louder argues "the negligently designed median and signs constituted a superseding cause of the accident." He contends that, because the road design was an unforeseeable intervening event, it "excus[ed]" him from criminal liability.[3] A superseding cause is one that is not reasonably foreseeable and "when, looking backward,

[3]Louder also contends the alleged superseding cause "removed the required mental state to satisfy the statute." He suggests the same unforeseeability that rendered the road design a superseding cause also prevented Louder from considering the particular risk, as required for recklessness. *See* A.R.S. § 13-105(10)(c) (person acts recklessly if aware of and consciously disregards substantial and unjustifiable risk). Because we do not agree the risk was unforeseeable, we do not address this argument separately.

after the event, . . . appears extraordinary." *Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983); *see also Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 168, 709 P.2d 517, 525 (1985) ("[T]he law does not relieve a defendant from liability simply because of the intervening act of a third person."). An intervening cause cannot be considered a superseding cause when the defendant's conduct "increases the foreseeable risk of a particular harm occurring through the conduct of a second actor." *Ontiveros*, 136 Ariz. at 506, 667 P.2d at 206; *see also State v. Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d 1088, 1093 (App. 2009).

¶11 Louder contends the road signs directed him into a dead-end lane—a design flaw that was so "abnormal and unforeseeable" that "nearly any human" would have struck the median and the adjacent parking lot or curb. Regardless of whether or to what extent the road design contributed to the accident, Louder cannot argue it is a superseding cause where his conduct increased the foreseeable risk he would strike other objects if an unanticipated lane change was required. *See Slover*, 220 Ariz. 239, ¶ 11, 204 P.3d at 1093. Louder does not challenge his convictions for driving while under the influence of liquor or driving with an alcohol concentration of .08 or more, and he concedes that driving under the influence may have increased the foreseeable risk "he might strike an object in the road like another vehicle or pedestrian." We agree. *See Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass'n*, 177 Ariz. 256, 263, 866 P.2d 1342, 1349 (1994) ("[I]t is almost always foreseeable that drinking and driving may lead to automobile accidents."); *Rourk v. State*, 170 Ariz. 6, 12, 821 P.2d 273, 279 (App. 1991) (accident caused by intoxicated driver not extraordinary event). However, we disagree with Louder's

suggestion that driving under the influence did not increase the foreseeable risk of an accident due to an unexpected lane change. "[W]e 'take a broad view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable.'" *Tellez v. Saban*, 188 Ariz. 165, 172, 933 P.2d 1233, 1240 (App. 1996), *quoting Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991). Louder's conduct increased the likelihood that any defect in the design of the roadway would result in an accident, and the road's design therefore cannot be considered a superseding cause as a matter of law.

Constitutionality of A.R.S. § 13-1602

¶12 Louder argues § 13-1602(B)(3) is unconstitutionally vague when applied in conjunction with A.R.S. § 13-1605 because the state can "arbitrarily choose to aggregate damages whenever it desires." The constitutionality of a statute is a question of law we review de novo, beginning with a strong presumption the statute is constitutional. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 6, 154 P.3d 391, 394 (App. 2007). The defendant carries the burden of establishing a statute's constitutional invalidity. *State v. McLamb*, 188 Ariz. 1, 5, 932 P.2d 266, 270 (App. 1996).

¶13 A statute is "'unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit standards for those who will apply it.'" *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 35, 218 P.3d 1069, 1082 (App. 2009), *quoting State v. Takacs*, 169 Ariz. 392, 394, 819 P.2d 978, 980 (App. 1991). To be constitutional, a statute must provide standards for its application that prevent arbitrary and discriminatory enforcement. *State v. Putzi*, 223

Ariz. 578, ¶ 4, 225 P.3d 1154, 1155 (App. 2010). However, "even a clearly worded statute may be susceptible to selective prosecution," and the relevant inquiry therefore is "whether the statute defines what is prohibited with reasonable clarity." *In re Moises L.*, 199 Ariz. 432, ¶ 12, 18 P.3d 1231, 1233-34 (App. 2000); *see, e.g., State v. Terrell*, 168 Ariz. 112, 113, 811 P.2d 364, 365 (App. 1991) (discretion whether to enforce false information statute presented no danger of arbitrary enforcement where statute defined prohibited conduct). "Further, it must be supposed that public 'officers will act fairly and impartially and in accordance with their best judgment,' and a statute will not be held unconstitutional because of a supposed possibility they will not do so." *McLamb*, 188 Ariz. at 6, 932 P.2d at 271, *quoting Brady v. Mattern*, 100 N.W. 358, 362 (Iowa 1904).

¶14 Section 13-1602(B)(3) provides: "Criminal damage is a class 5 felony if the person recklessly damages property of another in an amount of two thousand dollars or more but less than ten thousand dollars." Section 13-1605 states:

> Amounts of damage caused pursuant to one scheme or course of conduct, whether to property of one or more persons, may be aggregated in the indictment or information at the discretion of this state in determining the classification of an offense in violation of this chapter.

Louder argues § 13-1602(B)(3), as qualified by § 13-1605, is "subject to arbitrary and discriminatory law enforcement" because it "gives the State unlimited discretion to add damage together when [it] see[s] fit." He contends that, in this case, the state combined "harm that clearly constituted several misdemeanors . . . to instead manufacture a felony."

¶15 As a preliminary issue, a defendant does not have standing to challenge a statute for vagueness if the statute clearly applies to his conduct. *State v. Alawy*, 198 Ariz. 363, ¶ 6, 9 P.3d 1102, 1103 (App. 2000). Louder argues § 13-1602(B)(3) is vague because he was charged arbitrarily with a class five felony when he could have been charged with separate lesser offenses, such as misdemeanor criminal damage pursuant to § 13-1602(B)(5) or (6). But, even assuming Louder has standing to make this argument because he could have been charged separately as to each victim, the statute is not unconstitutionally vague.

¶16 Section 13-1602(B)(3) defines clearly the amount of damage that gives rise to criminal liability for a class five felony charge. Louder argues the phrase "property of another" in § 13-1602(B)(3) refers to the amount of damage caused to a single victim's property, based on the plain meaning of "another." He contends this interpretation is consistent with "the fact that defendants are commonly charged with crimes committed on each individual defendant." *See State v. Burdick*, 211 Ariz. 583, ¶ 10, 125 P.3d 1039, 1042 (App. 2005) (holding one act involving multiple victims could constitute multiple offenses). However, any ambiguity that may exist in the phrase "property of another" is resolved by § 13-1605, which provides notice that damages may be aggregated where they are the result of "one scheme or course of conduct."[4] We see no likelihood that a

[4]We note this reasonable reading of the statutes also is consistent with our rules of statutory construction. *See In re Estate of Winn*, 214 Ariz. 149, ¶ 16, 150 P.3d 236, 239 (2007) (more recent specific statute governs over older more general statute); 1977 Ariz. Sess. Laws, ch. 142, § 70 (phrase "property of another" used in original version of § 13-1602 to define criminal damage amounts); 1984 Ariz. Sess. Laws, ch. 19, § 1 (adding § 13-1605).

person of reasonable intelligence would not understand that damages suffered by multiple victims could be aggregated pursuant to §§ 13-1602 and 13-1605.

¶17 Louder argues the state can "arbitrarily choose to aggregate damages whenever it desires." However, a statute is not unconstitutionally vague due to a theoretical possibility of arbitrary enforcement or the exercise of discretion by law enforcement officers or prosecutors. *McLamb*, 188 Ariz. at 6, 932 P.2d at 271; *see also United States v. Jae Gab Kim*, 449 F.3d 933, 943 (9th Cir. 2006) ("[L]ack of prosecution of some cases that could be covered by a statute 'is no sufficient reason to hold the language too ambiguous to define a criminal offense.'"), *quoting United States v. Petrillo*, 332 U.S. 1, 7 (1947). Therefore, Louder has not established that § 13-1602 is unconstitutionally vague.

Disposition

¶18 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge